Supreme Court, U.S.
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NO. 94-____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,

Petitioner,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; and DONALD A. RANSTROM, as County Attorney for Blaine County, Montana,

Respondents

Petition for Writ of Certiorari From An Appeal to The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 15, 1994

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54

QUESTION PRESENTED

1. Whether a State, under the authority of 18 U.S.C. § 1161, has the jurisdiction to criminally prosecute Indians for violations of state liquor laws occurring within the boundaries of their federally-established Reservations.

LIST OF PARTIES

The Petitioner in this court and plaintiff below is the Fort Belknap Indian Community of the Fort Belknap Indian Reservation.

The Respondents in this Court are Joseph P. Mazuurek, as Attorney General for the State of Montana; and Donald A. Ranstrom, as County Attorney for Blaine County, Montana.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION & ORDER BELOW....	1
JURISDICTION.....	2
CONSTITUTIONAL & STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING WRIT.....	7
CONCLUSION.....	9

APPENDIX:

CIRCUIT COURT ORDER AND OPINION.....	Appendix 1
DISTRICT COURT ORDER...	Appendix 27

TABLE OF AUTHORITIES

CASES:

Draper vs. United States, 164 U.S. 240 (1896).. 8

Oliphant vs. Suquamish Tribe , 435 U.S. 191, 208 (1978)..... 8

Rice v. Rehner, 463 U.S. 713 (1983) 1,6,7,8

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962).... 8

CONSTITUTIONAL PROVISIONS:

U.S. Constitution. Art. I, § 8, clause 3.... 3

STATUTUES:

18 U.S.C.§ 1154.... 3,6

18 U.S.C.§ 1156.... 4,6

18 U.S.C. § 1161.... passim

28 U.S.C. § 1254(1)... 2

28 U.S.C. § 1331(a)... 6

28 U.S.C. § 1362.... 6

28 U.S.C. §1343.... 6

28 U.S.C. § 2201.... 6

I. OPINION AND ORDER BELOW

On December 16, 1995, the Ninth Circuit Court of Appeals reversed the judgment of the federal district court for the District of Montana, finding that the State of Montana did have jurisdiction, under 18 U.S.C. § 1161 to criminally prosecute Indians for violations of state liquor laws occurring on Indian reservations. The Ninth Circuit did affirm the holding of the District Court that federal court jurisdiction was present to detemine whether 18 U.S.C. § 1161 granted authority to states to prosecute Indians in state court for alleged on-reservation violations of state liquor laws.

The Ninth Circuit, in reversing the District Court, concluded that although the question of a state's jurisdiction to prosecute Indians in this context is one of first impression, *Rice v. Rehner*, 463 U.S. 713 (1983) provides sufficient guidance to conclude that 18 U.S.C. § 1161 intended to grant criminal jurisdiction to the states. The Order and Opinion of the Ninth Circuit is reproduced in the Appendix at A-1 to A-26. The District Court Opinion on

which summary judgment was founded, is reproduced in the Appendix at A-27 to A-41.

II. JURISDICTION

The Ninth Circuit Court of Appeals entered its order and judgment on December 16, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

U.S. Constitution. Art. I, § 8, clause 3:

> The Congress shall have Power.....to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.....

Statutes

18 U.S.C.§ 1154:

> Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, ...to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its

departments, exercises guardianship,.....shall, for the first offense, be fined not more thatn $500 dollars or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than five years, or both.

18 U.S.C.§ 1156:

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in Indian country or where introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, fo each subsequent offense, be fined not more than $2000 or imprisoned not more than five years, or both.

18 U.S.C. § 1161:

Provisions of 1154, 1156, 3113, 3448, and 3618 of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such

act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of Interior, and published in the Federal Register.

IV. STATEMENT OF THE CASE

In 1974, acting under the authority of 18 U.S.C. § 1161, the Fort Belknap Indian Community Council, the federally recognized governing body of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation, adopted an Ordinance opening up their Reservation to the sale of alcoholic beverages. See District Court Opinion, Appendix pp. A-22, A-25. Fourteen years later, the State of Montana sought to prosecute Caroline Brown, an enrolled member of the Community, and her husband, also an Indian, in State court, for possessing and selling alcohol within the boundaries of the Reservation, allegedly without a state license. The State took this action after initially causing an action to be filed in the Fort Belknap Indian Community Tribal Court charging the same offense.

The Fort Belknap Indian Community brought an

action in federal court under 28 U.S.C. §§ 2201, 1331(a), 1362 & 1343, seeking declaratory and injunctive relief against the State of Montana to prevent state criminal prosecution of Indians for actions wholly within the boundaries, and from interfering with tribal court orders regarding property seized in the case under tribal law. The District Court held that the State of Montana did not have the jurisdiction to prosecute Indians for actions within the boundaries, concluding if a violation of state law had taken place, that 18 U.S.C. 1161 would effectively require federal prosecution under 18 U.S.C. §§ 1154 & 1156.

The State appealed this judgment to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the District Cout, concluding that *Rice v. Rehner*, 463 U.S. 713 (1983) controlled the analysis and provided authority to construe 18 U.S.C. § 1161 as granting states authority to prosecute Indians in State courts for violations of state liquor laws occurring on reservation.

V. REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an Important question of federal law which has not been, but should be, settled by this court; Whether a state has the jurisdiction, under 18 U.S.C. § 1161, to prosecute in state court Indians who violate state liquor laws on Indian Reservations.

The authority to govern people and territory, without encroachment of states, is of primary importance to Indian Tribes in preserving their culture and self-government. In *Rice v. Rehner*, 463 U.S. 713 (1983), this court concluded that Tribal interests in regulating alcohol had to be balanced with State interests, and that each had the right to regulate alcohol transactions on reservations, pursuant to 18 U.S.C. § 1161. Id. at 731.

However, this court did not rule on the question of whether such authority to regulate included the right of states to prosecute Indians in state courts for violations of state liquor laws. The plain language of 18 U.S.C. § 1161 provides guidance on this issue:

> "Provisions of 1154, 1156, 3113, 3448, and 3618 of this title shall not apply .....provided such

> act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country....."

Clearly, the criminal sanctions of federal law apply if someone is found to be in violation of state or tribal law. There is no need to 'break new ground' and find that a state can prosecute an Indian for a violation of state liquor laws.

Historically, states have not had jurisdiction to prosecute Indians on reservations. *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351 (1962). States have prosecuted non-Indians for crimes on reservations in limited circumstances. *Draper vs. United States,* 164 U.S. 240 (1896)

Historically, tribes have had authority to adjudicate matters involving their membership, although this court has found that there has not been a history of prosecuting non-Indians. *Oliphant vs. Suquamish Tribe* , 435 U.S. 191, 208 (1978). Under this rationale, if tribes have no history with prosecuting non-Indians, and therefore have no jurisdiction to prosecute them in their courts, the lack of history of prosecution of Indians by states should foreclose

jurisdiction to do so now.

These principles have been developed by this court, and should be finally decided by this court, especially in this case, on an issue of "first impression".

CONCLUSION

Petitioner respectfully requests this Court issue a writ of certiorari to the Ninth Circuit Court of Appeals for the purpose of reviewing the question presented.

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March 15, 1995

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-36086
CT/AG#. CV-89-00215-PGH

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION

Plaintiff - Appellee

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; DONALD A. RANSTROM, as County Attorney for Blaine County, Montana

Defendants - Appellants

APPEAL FROM the United States District Court for the District of Montana (Great Falls).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Great Falls) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART.

Filed and entered December 16, 1994.

Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 93-36086
D.C. No. CV-89-00215-PGH

THE FORT BELKNAP INDIAN COMMUNITY
OF THE FORT BELKNAP INDIAN RESERVATION,

Plaintiff - Appellee,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; DONALD A. RANSTROM, as County Attorney for Blaine County, Montana,

Defendants - Appellants.

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
November 3, 1994-Seattle, Washington

Filed December 16, 1994

Before: Robert R. Beezer and Ferdinand F. Fernandez,
Circuit Judges, and William H. Orrick,*
Senior District Judge.

Opinion by Judge Beezer

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* The Honorable William H. Orrick, Senior United States District judge for the Northern District of California, sitting by designation.

Appendix 3

OPINION

BEEZER, Circuit Judge:

The State of Montana seeks enforcement of its liquor laws on Indian reservations. Joseph Mazurek, in his capacity as Attorney General for the State of Montana ("Montana"), appeals the district court's grant of summary judgment in favor of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation ("Community") in a declaratory judgment action. Montana argues that the district court should have abstained from exercising its jurisdiction. *Younger v. Harris*, 401 U.S. 37 (1971). Montana further argues that the district court erred in holding that it could not enforce its state liquor laws through criminal penalties against tribal members who reside on Indian reservations. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part and reverse in part.

I

Although the declaratory judgment action brought by the Community was filed in December of 1989, the underlying dispute began almost two years earlier. Caroline and Harley Brown operated a grocery store in Hays,

Montana, within the confines of the Fort Belknap Indian Reservation. Caroline Brown was a Community member. Although Harley Brown was an Indian, the record does not indicate whether he also was a Community member. The Browns sold, among other sundries, beer and wine. In January of 1988, the Blaine County Attorney filed charges against the Browns for possessing and selling liquor without a license.[1] Mont. Code Ann. § 16-6-301(1) (1989).

The Browns moved to dismiss the prosecution, arguing that Montana lacked criminal jurisdiction over Indians for offenses committed on Indian reservations. The Blaine County District court disagreed. The Browns sought immediate review in the Montana Supreme Court, which accepted supervisory control jurisdiction. That court decided that Montana could bring a criminal proceeding in state court against an Indian for violations of the state's liquor laws. *Brown v. District Ct.*, 777 P.2d 877 (Mont. 1989).

The Community then filed a declaratory judgment

[1] The Browns were initially charged in tribal court with violations of tribal liquor ordinances. That court, however, dismissed the charges without prejudice at the request of a Bureau of Indian Affairs investigator who indicated that prosecution would be sought in either state or federal court.

action against the State of Montana in federal district court. *See* 28 U.S.C. § 2201. It accused the state of frustrating "th[e] exercise of tribal sovereignty," the tribe's ability to "exercise reasonable forms of self government," and the ability of the Community "to govern itself." The Community sought a declaration that Montana could not criminally prosecute Indians for liquor law violations on Indian reservations. It also sought permanent injuctive relief to prevent any attempt at enforcing Montana's criminal laws on the Fort Belknap Indian Reservation. Montana moved for summary judgment, arguing that the action was barred by the Eleventh Amendment, and that, in any case, 18 U.S.C. § 1161 permitted it to prosecute Indians for criminal violations of state liquor laws.

The district court granted Montana's motion on Eleventh Amendment grounds, *see Fort Belknap Indian Community v. State of Montana*, 793 F. Supp. 949 (D. Mont. 1992), but stated that it would have ruled in favor of the Community on grounds that the state had no jurisdiction to maintain such prosecutions. The district court provided the Community with time to amend its complaint in order to

avoid the preclusive effect of the Eleventh Amendment. The Community did so, and the district court reversed itself, granting the Community's motion for summary judgment "to the limited extent the community seeks declaratory relief concerning the State of Montana's authority to enforce, through criminal prosecutions, its liquor laws on Indian Reservations." No injuctive relief was ordered.

Montana then moved pursuant to Federal Rule of Civil Procedure 60(b) for relief from judgment on grounds that the district court should have refrained from exercising jurisdiction over the controversy under the *Younger* abstention doctine. The district court denied the motion. Montana appealed.

II

Montana argues that the district court should have dismissed the declaratory judgment action pursuant to *Younger* abstention principles. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971) (applying *Younger* principles to declaratory judgment actions). It contends that a state criminal proceeding was ongoing against the Browns, and that principles of comity

and federalism should have guided the district court toward noninterference during the pendency of that prosecution. We disagree.

We review *de novo* whether abstention was required under the *Younger* doctrine. *Wiener v. County of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994). In *Younger*, the Supreme Court held that a combination of federal-state comity, federalism, and the limited role for courts of equity "ordinarily require federal courts to abstain from enjoining pending state criminal proceedings." *Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1365 (9th Cir. 1994). *Younger* abstention is appropriate if three criteria are met: (1) state judicial proeedings must be ongoing; (2) the state proceedings must implicate an important state interest; and (3) the state proceedings must offer an adequate opportunity to litigate federal constitiutional issues. *Kenneally v. Lungren*, 967 F.2d 329, 331 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). If these three criteria are met, the

district court must dismiss the action.[2] *Confederated Salish v. Simonich*, 29 F.3d 1398, 1401 (9th Cir. 1994); *Wiener*, 23 F.3d at 266.

In applying the *Younger* test, we adhere to the basic principle that abstention is an "extraordinary and narrow exception" to a district court's role as adjudicator of a ripe controversy. *Barbosa*, 35 F.3d at 1365 (citations omitted). Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction granted them by Congress. *Colorado River Water Conservation Dist. v. United Staes*, 424 U.S. 800, 817 (1976). In a potential abstention case, the Supreme Court says we are "not to find some substantial reason for the *exercise* of federal jurisdiction" but rather to determine if "exceptional" circumstances exist to justify surrender of jurisdiction. *Benavidez v. Eu*, 34 F.3d 825, 831 (9th Cir. 1994) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26

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2 Federal courts have recognized a few limited exceptions to *Younger* abstention. For instance, a federal court should not abstain if the state court action was initiated in bad faith or if the challenged state law is flagrantly and patently unconstitutional. *Lebbos v. Judges of the Super. Ct.*, 883 F.2d 810,814 (9th Cir. 1989). Neither of these exceptions, however, applies here.

(1983)).

The district court offered two grounds for its decision to exercise its jurisdiction and refuse to abstain under *Younger* . First, the court held that the state did not have a vital state interest in asserting criminal jurisdiction over Indians for crimes committed on Indian reservations. Second, the district court determined that abstention was not appropriate because there were different parties in the federal and state action--the Browns in state court and the Community in federal court. Thus, the Community had no opportunity to raise its federal claim in state court. On appeal, Montana contests both of these grounds. We need address only the first.

[1] The Community correctly argues that Montana cannot demonstrate an important state interest. Although there is no question that Montana has a legitimate interest in the enforcement of its liquor laws through criminal prosecution, the primary issue here is whether the state has jurisdiction to prosecute Indians who violate Montana liquor law on an Indian reservation. That question is one of federal jurisdiction.

In *Sycuan Band of Mission Indians v. Roache*, No. 93-55430, 1994 WL 518271, at *5 (9th Cir. Sept 26, 1994), we addressed a similar situation. The Sheriff of San Diego County initiated prosecutions against four Indians for alleged violations of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which applied state gaming laws to Indian reservation. The Tribe brought an action in federal court for declaratory and injunctive relief, which was granted. The Sheriff argued on appeal that *Younger* abstention was appropriate. We disagreed, finding that the State failed to demonstrate an important state interest. We stated that "the threshold issue of the State's jurisdiction to prosecute is a matter of federal, not state, law." *Roache*, 1994 WL 518271, at *5.[3]

[2] Our analysis is similar here. The threshold

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3 In support of our holding, we relied on a Tenth Circuit opinion that reached the same conslusion. *See Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989). In *Seneca*, the court held that, in case where federal jurisdiction was the "central issue [,]...the importance of the State's interest in the state litigation is minimal." *Id.* at 714. The court added that when a state court is asked to decide issues of federal law "in an area in which federal interests predominate, the State's interest in the litigation is in our view not important enough to warrant *Younger* abstention." *Id.*

question in this case is whether Montana has jurisdiction to prosecute Indians in state court for violations of state liquor laws. Although the Supreme Court has already determined that states may regulate liquor transactions on Indian reservations, *see Rice v. Rehner*, 463 U.S. 713 (1983), the question of a state's jurisdiction to prosecute is one of first impression. It is an issue of federal law. The state undoubtedly has an interest in enforcing its liquor laws, but only if federal law gives it jurisdiction to do so for violations that occur on an Indian reservation. Because the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate here.[4]

III

Montana next argues that the district court erred in holding that the state had no jurisdiction to criminally prosecute Indians for violations of state liquor laws occurring on Indian reservations. Montana relies on *Rice v. Rehner*, 463 U.S. 713 (1983), for the proposition that states have authority to regulate liquor transactions on Indian

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4 Because we agree with the district court that Montana has failed to demonstrate an important state interest, we need not addresss whether Montana met other *Younger* elements.

reservation. Thus, Montana asserts, it must also have the power to enforce its regulations through criminal sanctions for liquor violations. If the state does not have such power, Montana contends, its regulatory authority would be eviscerated.

We review *de novo* the district court's decision granting summary judgment. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 19920. Questions of statutory interpretations are also reviewed *de novo*. *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 718 (9th Cir. 1986).

[3] Two fundamental policy interests clash in this dispute. The state of Montana has an interest in enforcing its liquor laws, if necesssary, through criminal prosecutions. The Community has an interest in self-government and tribal sovereignty; matters that are especially jeopardized when an enrolled Tribal member must appear in state court to face criminal prosecution. Today, we must determine which interest should prevail. Because we believe both federal statutes and case law have struck the balance in favor of the state in the narrow context of liquor laws, we reverse the

district court and hold that Montana may maintain criminal prosectuions of Indians in state court for on-reservation liquor law violations.

State law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent congressional consent. Felix S. Cohen's Handbook of Federal Indian Law 259-60 (1982 ed.) ("Cohen's Handbook"); *see, e.g., United States v. John*, 437 U.S. 634, 651 (1978). In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court examined whether 18 U.S.C. § 1161 provides as follows:

> The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian county, certified by the Secretary of the Interior, and published in the Federal Register.

In *Rice*, the Court indicated that Congress, through this statute, intended to permit lifting the federal prohibition against the sale and use of liquor on Indian reservations that had existed since 1832. *Rice*, 463 U.S. at 726-28. Federal statutes prohibiting the selling of liquor on a reservation remained in effect, *see, e.g.*, 18 U.S.C. § 1154, but § 1161

gave Indian Tribes the option to enact tribal ordinances permitting liquor sale and consumption. Any liquor transactions, however, needed to "conform[ ] both with tribal ordinances and state law." *Rice*, 463 U.S. at 728. The tribes in *Rice* had argued that, although state law was to be the benchmark for tribal liquor sales, regulation of liquor was exclusively the province of the federal government and states were preempted from exercising authority in the area. The Court disagreed and said that "[o]ur examination of § 1161 leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Id.* at 726.

The Court's holding that states had the authority to regulate liquor on Indian reservations was guided primarily by its analysis of "the role of tribal sovereignty." *Id.* at 719. Historical notions of tribal sovereignty are the "backdrop" against which federal statutes are read in determining whether state laws have been preempted from being enforced on Indian Land. Cohen's Handbook at 274-75; *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). The greater the tradition of tribal independence and self-

government, the more reluctant the Court is to infer that Congress has authorized "the assertion of state authority." *Rice*, 463 U.S. at 719.

The Court concluded, however, that Indians had been divested of any inherent power to regulate in this area, and did not possess "the usual accoutrements of tribal self-government." *Rice*, 463 U.S. at 724 (quoting *McClanahan*, 411 U.S. at 167-68); *see* Cohen's Handbook at 307 ("[c]ontrol of liquor has historically been one of the most comprehensive federal activities in Indian affairs . . . "). The *Rice* Court found that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Rice*, 463 U.S. at 722; *see Squaxin Tribe*, 781 F.2d at 719 ("tribal sovereignty is not infringed" by state's regulation of tribal liquor sales). The Court determined that it would accord "little if any weight" to asserted interests in tribal sovereignty. *Rice*, 463 U.S. at 725.

The Court recognized that although states generally had little or no power to regulate the affairs of Indians on a reservation, "that assumption woulf be unwarranted in the

narrow context of the regulation of liquor." *Id.* at 723. Distribution of liquor, in the Courts's opinion, had a "significant impact" beyond the boundaries of an Indian reservation. *Id.* at 724. Indeed, the state has "an unquestionable interest in the liquor traffic that occurs within its borders." *Id.* In light of the lack of tribal sovereignty and the high state interest, the Court read § 1161 as delegating part of the federal government's regulatory authority to tribes, *see United States v. Mazurie,* 419 U.S. 544, 554 (1975), and another part to the states. *Rice* 463 U.S. at 731. This dual delegation was consistent, the Court found, with historically "shared concurrent jurisdiction" between the states, tribes, and federal government in this area. *Id.* at 728-290.

Although the Court did not address the question before us today, it did make several references to criminal prosecution in the area of liquor regulation. The Court noted that Congress had historically permitted concurrent state regulation "through the imposition of criminal penalties on those who supply Indians with liquor, or who introduce liquor into Indian country." *Id.* at 726. Later in its opinion,

the Court cited an Interior Department treatise in which "the Solicitor of the Interior Department assumed that § 1161 would result in state prosecutions for failing to have a state license." *Id.* at 732. The Court disapproved of a later Interior Department decision which concluded that states could not prosecute Indians for violations of stae liquor laws. *Id.* at 730 n.13.

The parties have not provided, nor have we found, case law addressing the question of whether *Rice* should be extended to permit state criminal prosecution for violation of state liquor laws on Indian reservations. The Montana Supreme Court found that such an extension was warranted, indeed necessary, in order to enforce a state regulatory scheme. *Brown*, 777 P.2d at 881 ("[i]f we were to interpret 18 U.S.C. § 1161 as permitting only state licensing of liquor transactions on Indian reservations, but not the power to enforce the same, the state would be powerless to effectuate the intent of Congress that such liquor transactions on reservations be 'in conformity with state law.'").

The district court reached the opposite conclusion, limiting *Rice's* holding to the proposition that states may

regulate liquor, but stopping short of allowing states to exercise criminal jurisdiction. The distict court read § 1161 as lifting the previously imposed federal penalties for liquor transactions on Indian reservations only so long as those transactions complied with state liquor laws. The district court found that an act in violation of state liquor laws "necessarily invokes the federal penalties conditionally set aside by section 1161." Thus, the interaction of the federal statutes would never permit state criminal prosection of an Indian for a violation of state liquor laws on an Indian reservation. Either Indians would be complying with state law under § 1161, or Indians would be violating state law, thus dropping out of § 1161 and reverting back to the federal criminal prohibitions contained in 18 U.S.C. § 1154.

[4] In our judgment, the Montana Supreme Court correctly resolved the issue. All of the reasoning of *Rice* indicates that states should have concurrent jurisdiction to bring criminal prosectution in this narrow context. It is true that notions of tribal self-government usually preclude either

criminal or civil jurisdiction of state courts over Indians.[5] Cohen's Handbook at 349. Giving states criminal jurisdiction would concededly be an even more significant infringement on tribal self-government than mere regulation of liquor transactions. The *Rice* court, however, concluded that tribes had no tradition of self-government in the area of liquor due to pervasive federal control. *See* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1, 18-19 (1987) (noting that strength of federal regulation operated to deprive tribe of power and "indirectly increases the power of the state to fill the vacuum"). Because of this conclusion, the *Rice* Court found that it was not necessary that Congress expressly indicate that the State had jurisdiction to reulate liquor. *Id.* at 731-33. The same reasoning applies here. Given the unique context of liquor regulation and enforcement, it would not be

5 Of course, some states have asssumed jurisdiction over both criminal and civil mattter on Indian reservation pursuant to Public Law 280, 18 U.S.C. § 1162. These states include California, Minnesota (in part), Nebraska, Oregon (in part), Wisconsin (in part), and Alaska. *See* Cohen's Handbook at 362-72 (reviewing jurisdiction under Public Law 280). Although the *Rice* case arose in California, the Court explicitly relied on § 1161 and not on § 1162. Our holding today neither relies on nor implicates § 1162.

a severe erosion of tribal sovereignty to interpret § 1161 as authorizing the prosecution of Indians in state court for liquor violation on reservations. *See* Canby, *supra*, at 19 (*Rice* dealt with "the unusual subject of liquor regualation").

[5] Section 1161 provides for tribal and state regulation of liquor. The Community contends that the tribe can, and should, prosecute Indians for violations of state law. It follows logically, however, that states should have jurisdiction to prosecute Indians for violation of state law. Montana has the primary interest in the enforcement of its own liquor laws. The power to regulate is a broad power. *See, e.g., Chickasaw Nation v. State of Oklahoma*, 31 F.3d 964 (10th Cir. 1994) (power to regulate under § 1161 can include power to tax). It is broad enought to include the power to enforce state regulation through criminal penalties. Although criminal enforcement is necessarily intrusive, it is one method by which Montana enforces liquor laws. Because jurisdiction is concurrent between the tribe and state, both should be able to begin criminal prosecutions for

violation of their respective laws.[6]

We find the district court's attempt to limit *Rice* unpersuasive because its opinion gave § 1161 an unjustifiably narrow reading. The *Rice* Court broadly found that Indian Tribes have no sovereignty interest and no self-government interest in liquor regulation. The Court further found that congress affirmatively authorized state regulation. The district court's reading of *Rice* would give the states no power at all, but merely allow the federal government to enforce state law. This interpretation of § 1161 was rejected in *Rice*.

Furthermore, the district court's support for its holding that state law was to be a "standard of measurement" to be applied in federal criminal proceedings is not strong. It relies on language from Justice Blackmun's dissent in *Rice* and on language from Cohen's Handbook, which was published before the *Rice* decision. In contrast, the Court in *Rice* indicated that "state laws would apply of their own

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[6] Of course, the federal government also has an interest in enforcing its law, but it has indicated no interest in enforcing individual state's laws. Section 1161 expresses an affirmative grant for states to regulate and no commensurate interest in exclusive federal enforcement.

force to govern tribal liquor transactions." 463 U.S. at 726 Section 1161 is an affirmative grant of power to the states, not merely a standard of federal courts to apply.

The district court's analysis also fails because it would operate to deprive Indian Tribes of jurisdiction to criminally prosecute violations of tribal liquor ordinances. If an Indian did not comply with a tribal liquor ordinance, under the district court's reading of the statutory scheme, § 1161 would not apply and the Indian would be subject only to federal panalties. This system would deprive Indian tribes of their right to enforce their own ordinances, and would amount to a greater loss of tribal self-government and sovereignty than permitting states to criminally prosecute Indians for violations of state law.

We need not address here the scope of federal criminal jurisdiction over Indians for liquor violations.[7] It is enough to recognize that federal jurisdiction to prosecute is not exclusive. Indeed, other federal statutes reveal that the

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7 The Rice court also declined to address the scope of federal criminal jurisdiction because the federal government is similarly not a party, and a determination of its power or jurisdiction beyond the determination that it is not exclusive, is unnecessary.

federal government is capable of making clear its intention to retain exclusive jurisdiction when state laws or issues are involved. *See, e.g.*, 18 U.S.C. § 1153 (Indians are subject to 'exclusive jurisdiction of the United States" for various major crimes committed in Indian country); 18 U.S.C. § 1166(d) ("United States shall have exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country").

IV

Several additional arguments of the Community require consideration.

The Community argues that *Rice* did not overrule or limit *United States v. Mazurie*, 419 U.S. 544 (1973), which had held that Indian Tribes had been delegated power by § 1161 to regulate liquor transactions. The *Rice* Court later held that states also received comparable delegated power. *Mazurie* does not provide any support for the Community because it did not address the question of criminal enforcement of a state's laws. It involved the power of the federal government to prosecute a non-Indian for a violation

of a tribal ordinance. The Community adds that Congress has the power to supercede state jurisdiction in Indian country. This is, of course, true. Here, however, the statute at issue grants the states such authority.

The Community relies on *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), for the proposition that states have no jurisdiction to prosecute Indians for offenses which are committed on Indian reservations. *Seymour* is inapposite. It relied on 18 U.S.C. § 1153, which explicitly provided that the United States had "exclusive jurisdiction" over certain crimes committed by Indians against Indians in Indain country. *Id.* at 352 n.2. Here, no such clear congressional intent to reserve federal jurisdiction is present.[8]

The Community also relies on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held

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8 Similarly, our recent opinion in *Sycuan Band of Mission Indians v. Roache*, No. 93-55430, 1994 WL 518271 (9th Cir. Sept. 26, 1994), is of no support to the Community. The statute at issue in that case, the Indian Gaming Regulatory Act, provided that "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country . . .." 1994 WL 518271, at *2. Thus, the state's lack of criminal jurisdiction was made explicit by Congress.

that tribal courts have no jurisdiction to criminally prosecute non-Indians. The Community argues that the reverse should be true: the state has no jurisdiction to criminally prosecute Indians. In *Oliphant*, however, there was no "congressional authorization"; the tribes merely argued that criminal jurisdiction should "flow[ ] automatically" from their retained inherent powers. *Id.* at 195-96. The Court held that, "absent affirmative delegation of such power by Congress," Indians had no criminal jurisdiction over non-Indians. *Id.* at 208. Here, Montana does not argue, indeed it cannot argue, that it has inherent criminal jurisdiction. States generally have no criminal jurisdiction over Indians for acts committed on Indian reservations. It argues that, in the limited field of liquor enforcement, it has criminal jurisdiction pursuant ot the congressional mandate of 18 U.S.C. § 1161 as interpreted by *Rice v. Rehner*. *Oliphant* does not affect the result here.

The Community further argues that Montana had never before exercised its jurisdiction to criminally prosecute Indians for conduct on Indian reservations. It observes that the tribal courts are available as easy and convenient forums

for prosecution. It further contends that it did not intend to grant jurisdiction to the state to criminally prosecute Indians. These arguments are unavailing. The only question here is whether Montana has the power to bring criminal prosecutions in the narrow context of liquor violations. Whether it has done so in the past or whether prosecution in a tribal forum would be more convenient is irrevelant. Although Montana presumably could agree, and perhaps should agree, to work with tribal courts in prosecuting Indians for violations of state liquor laws, it is not required to do so. Also irrelevant is whether the Tribe intended to cede jurisdiction to the state. Montana has been granted jurisdiction by Congress, thus the Tribe's approval is not necessary.

AFFIRMED in part, REVERSED in part.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

NO. CV-89-215-GF

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,)

Plaintiff,)

vs.)

THE STATE OF MONTANA)

Defendant.)

MEMORANDUM AND ORDER

Plaintiff, the Fort Belknap Indian Community ("the Community"), instituted the present declaratory judgment action, pursuant to 28 U.S.C. § § 2201-2202, challenging the State of Montana's authority to prosecute Indian persons for criminal violations of state liquor laws that occur within

Indian country.[9] Having considered the arguments presented by the parties in support of their respective motions for summary judgment, the court is prepared to rule.[10]

BACKGROUND

This matter has its genesis in a criminal proceeding in

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9 Title 18 U.S.C. § 1151 defines "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

10 The State of Montana, in moving for summary judgment, asserts plaintiff's action is barred by the Eleventh Amendment to the United States Constitution. The state's argument is well taken, given the fact the State of Montana is the sole defendant named in the Community's complaint. see, Kentucky v. Graham, 473 U.S. 159, 167, n. 14 (1985), citing, Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam) ("[u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it . . . a State cannot be sued directly in its own name regardless of the relief sought."). The Community's argument to the contrary is unpersuasive. see, Blatchford v. Native Village of Noatak, ___ U.S. ___, 115 L. Ed.2d 686 (1991) (Eleventh Amendment precludes suits by Indian tribes against states without their consent). Nevertheless, the court deems it appropriate to enter this memorandum, recognizing the eventual likelihood of the Community amending their complaint to add additional defendants and thereby avoid the preclusive effect of the eleventh amendment.

the District Court of the Seventeenth Judicial District, Blaine County, Montana, charging Caroline Ann Brown and Harley LeRoy Brown with the felony offense of possession and sale of beer and wine without a license in violation of Mont. Code Ann. § 16-6-301(1) (1989). The Browns operated a grocery store in Hays, Montana, within the exterior boundaries of the Fort Belknap Indian Reservation. Caroline Brown is an enrolled member of the Fort Belknap Indian Community and Harley Brown is an Indian person residing within the boundaries of the Fort Belknap Reservation.

The Browns moved to dismiss the action, asserting the State of Montana lacked criminal jurisdiction over Indians for offenses occurring on the reservation. The Browns further moved to suppress certain evidence seized by law enforcement officials during a January 6, 1988, search of their store.[11] The district court denied both motions and the Browns petitioned the Montana Supreme

[11] On January 6, 1988, search warrants for the Browns' store were issued by the Blaine County Justice Court and the Fort Belknap Tribal Court. A search of the Browns' store was effected pursuant to the tribal court warrrant and significant quantities of beer and wine products were seized. The seized goods were subsequently stored at the Blaine County Sheriff's Office.

Court for a writ of supervisory control or other appropriate relief. The court denied the Browns' application for supervisory control, holding, inter alia, a criminal proceeding could be brought in state court for alleged violations of state liquor laws by Indain persons in Indian country. Brown v. District Court, 238 Mont. 248, 777 P.2d 877 (1989).

On November 9, 1989, the Fort Belknap Tribal Court pursuant to motion of the Community, ordered the return of the evidence seized during the search of the Browns' store. The tribal court subsequently issued a writ of assistance commanding the Bureau of Indian Affairs ("BIA") to retrieve the property from the Blaine County Sheriff's Office. In response, the Blaine County Attorney obtained a protective order from the Blaine County district court, providing for the continued retention of the evidence by the Blaine County Sheriff's Office. The protective order also purported to "excuse" all law enforcement officers of Blaine County and officers of the district court from complying with any tribal court order to the contrary.

On December 18, 1989, the Community instituted

the present action, seeking declaratory and injunctive relief as against the State of Montana. The Community asserts the State of Montana, in attempting to enforce state criminal laws within reservation boundaries against enrolled members of federally recognized Indian tribes, has infringed upon the Community's right to self-government. Accordingly, the Community requests, inter alia, an order enjoining the state from attempting to enforce state criminal laws within the reservation boundaries against Indian persons and, furthermore, from interfering with tribal court orders regarding the seized evidence. The Community invokes the jurisdiction of this court pursuant to 28 U.S.C. § § 1331(a), 1362 and 1343.

DISCUSSION

In asserting the authority to enforce its liquor laws within reservation boundaries among tribal members or other Indians, the State of Montana relies on the Supreme Court's decision in Rice v. Rehner, 463 U.S. 713 (1983). In Rice, the operator of a small general store on the Pala Reservation in California appealed a district court decision requiring her to obtain a state license for the retail sale of liquor. The Pala

Band of Mission Indians had adopted an ordinance permitting the sale of intoxicating beverages provided such sales were in conformity with the laws of California. Rehner v. Rice, 678 F.2d 1340, 1342 (9th Cir. 1982), rev'd 463 U.S. 713 (1983).

The Ninth Circuit Court of Appeals reversed the district court, holding a state's regulatory jurisdiction to license liquor transactions or distribute liquor in Indian country was preempted by 18 U.S.C. § 1161.[12] The Supreme Court granted certiorari and reversed the Ninth Circuit, stating, "[O]ur examination of § 1161 leads us to conclude that Congress authorized, rather than preempted, state regulation over Indian liquor transactions." 463 U.S. at 726.

> It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian

[12] Section 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . .
>
> 18 U.S.C. § 1161.

> liquor transactions as long as those transactions conformed both with tribal ordinances and state law. it is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delagated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area.

463 U.S. at 728-29.

In additon, the Court noted the presumption that states have no power to regulate the affairs of Indians on reservations was unwarranted in the narrow context of liquor regulation. 463 U.S. at 723.

The Community views Rice as inapposite to the present case. Instead, the Community submits this matter is governed by United States v. Mazurie, 419 U.S. 544 (1975), wherein the Court stated:

> [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.

419 U.S. at 557. The Community asserts Mazurie established tribal sovereignty in the area of liquor licensing and distribution, thereby precluding any state regulation in the area and, most assuredly, criminal jurisdiction to prosecute Indian persons.

The Supreme court expressly rejected the interpretation of Mazurie advanced by the Community with respect to states' regulatory jurisdiction. Rice, supra, 463 U.S. at 721. While the Mazurie decision clearly acknowledges the tribes' authority to regulate the possession and sale of alcohol on reservations, it did not abrogate the state's concurrent authority over the same. Rice, 463 U.S. at 733.

> Application of the state licensing scheme does not 'impair a right granted or reserved by federal law.' Kake Village, 369 U.S. at 75. On the contrary, such application of state law is 'specifically authorized . . . by Congress . . . and [does] not interfere with federal policies concerning the reservations." Warren Trading Post Co. v. Arizona Tax Comm'n, 380
>
> Id. at 734-35.

The Community alleges Rice is distinguishable because the decision therein was predicated on certain historical findings absent from the present action, namely, the lack of any prior attempts by the State of Montana to regulate the possession and sale of liquor on Indian reservations. The Community's argument is misplaced. The historical findings relied on in Rice did not involve the State of California's attempts to enforce its liquor code on

Indian reservations, but rather the fact that "control of liquor has historically been one of the most comprehensive federal activities in Indian affairs." Rice, 463 U.S. at 722, quoting, F. Cohen, Handbook of Federal Indian Law 307 (1982 ed.).

> The Colonists regulated Indian liquor trading before this nation was formed, and Congress exercised its authority over these transactions as early as 1802 . . . . Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances.

Id. at 722.

Rice clearly established a state's right to regulate the possession and sale of liquor by Indians in Indian country. However, Rice is not dispositive in that the Court did not address the issure presented herein, namely, a state's authority to prosecute Indian persons for violations of state

liquor laws occurring in Indian country.[13] The State of Montana contends Congress would not have provided states the authority to regulate liquor transactions on reservations without the concomitant ability to enforce, through criminal prosecutions, its liquor laws. This court disagrees.

When the Twenty-First Amendment repealed the federal penalties for the sale of liquor, all Indian country remained "dry" by federal law; and for the next twenty years

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13 Rice addressed the limited issue of whether a state liquor license was necessary for the retail sale of liquor on a reservation. In fact, the Court acknowledged its decision did not reach the issue of federal criminal jurisdiction under 18 U.S.C. § 1161. "We also note that it apears the court [Court of Appeals] was interpreting the reach of federal criminal jurisdiction under § 1161 as much as it was deciding the scope of state jurisdiction. In the light of the fact that the Federal Government was not a party below, we do not understand this aspect of the court's holding" 463 U.S. at 734 n.18. Furthermore, the Court could not have addressed the issue presented by the present action given the fact that the State of California exercises general criminal jurisdiction over Indian country, pursuant to 18 U.S.C. § 1162, and may enforce directly any substantive criminal provisions governing liquor sales on Indain reservations. 463 U.S. at 741 n.4 (Blackmun, J., dissenting).

it remained a crime, under 18 U.S.C. § 1154[14] to sell liquor in Indian country. Rehner v. Rice, supra, 678 F.2d at 1352 (Goodwin, J., dissenting). In 1953, Congress enacted 18 U.S.C. § 1161, which allowed Indian tribes to regulate the introduction of liquor into Indian country, provided state law was not violated. Mazurie, supra, 419 U.S. at 547, citing,

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14 Section 1154 provides:

> Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, . . . to any Indian to whom an allotment of land has been made while the titles to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, . . . shall, for the first offense, be fined not more than $500 dollars or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. § 1154

18 U.S.C. § 1161.[15] Congress took care, however, to lift the criminal penalties previously imposed upon liquor traffic with Indians only so long as the newly legalized "transaction" conformed with state laws. Rehner, 678 F.2d at 1352 (Goodwin, J. dissenting), citing 18 U.S.C. § 1161. See also, Rice, 463 U.S. at 722 ("these prohibitions [on Indian liquor trading] are still in effect subject to suspension conditioned on compliance with state laws and tribal ordinances."); Cohen, at 306-307 ("This provision [prohibiting the sale of liquor to an Indian person] is still in the code as part of 18 U.S.C. § 1161 and can be

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15 In 1974, the Fort Belknap Community Council enacted ordinance 3-74, entitled "Ordinance Legalizing the Introduction, Sale, or Possession of Intoxicants", which provides, in part:

> NOW THEREFORE BE IT ORDAINED that the introduction, sale or possession of alcoholic beverages shall be lawful within the Indian country under the jurisdiction of the Fort Belknap Indian Community, provided that such introduction, sale, or possession, is in conformity with the laws of the State of Montana.

Ordinance 3-74 is apparently enforced under Title V, Section 1.81 of the Fort Belknap Tribal Code, which prohibits violations of Tribal law. However, neither side has provided the court a copy of Title V. Section 1.81 and, as a result, the court is unaware of the potential criminal penalties for violation of ordinance 3-74. Furthermore, the court is unaware of whether, historically, the Community has prosecuted Indian persons for violating ordinance 3-74.

conditionallly suspended by enactment of a tribal ordinance pursuant to the latter section.").

The federal statutes prohibiting the sale and possession of liquor in Indian country, namely 18 U.S.C. § § 1154 and 1156,[16] remain in effect despite the enactment of 18 U.S.C. § 1161. See, Mazurie, supra (non-Indians operating a bar without the requisite tribal liquor license were convicted, in federal court, of introducing "spirituous beverages" into Indian country, in violation of 18 U.S.C. § 1154). The federal statutes are suspended, however, by compliance with state liquor laws and tribal ordinances.

Accordingly, state liquor laws must necessarily provide "the standard of measurement to define lawful and unlawful activity on the reservation." Rice, 463 U.S. at 744 n.7 (Blackmun, J., dissenting), quoting, Applicability of the

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16 Section 1156 provides:

> Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in Indian country or where introduction is prohibitied by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. § 1156.

Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39, 40 (1971). See also Cohen, at 308 ("[S]ection 1161 incorporates state liquor laws as a standard of measurement to define what conduct is lawful or unlawful under federal law . . . ."). Id. at 744 n.8. An act or transaction in violation of either applicable state liquor laws or tribal ordinances necessarily invokes the federal penalties conditionally set aside by section 1161. See, Cohen, at 308. Based on the foregoing analysis, this court concludes that while the State of Montana has the authority, pursuant to 18 U.S.C. § 1161, to regulate liquor transactions in Indian country, the federal government retains criminal jurisdiction to enforce the penalty provisions of 18 U.S.C. § § 1154 and 1156 for violations of state liquor laws.

CONCLUSION

The Community's action against the State of Montana is barred by the Eleventh Amendment to the United States Constitution. Consequently, IT IS HEREBY ORDERED that the State of Montana's motion for summary judgment be, and the same hereby is, GRANTED. The Community's motion for summary judgment is likewise

DENIED. The Community may, however, file an amended complaint in this matter within ten (10) days of the date hereof.

IT IS SO ORDERED.

DATED this 22nd day of April, 1992.

/S/
PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUN 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1728

In The

Supreme Court of the United States

October Term, 1994

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,

Petitioner,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; and MARK HARSHMAN, as County Attorney for Blaine County, Montana,

Respondents.

On Petition for Writ of Certiorari From An Appeal To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the State of Montana have authority to enforce its licensure laws with respect to the sale of alcoholic beverages in Indian country through criminal proceedings against Indians who fail to comply with those laws?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

I. State Court Proceedings 1

II. Federal Court Proceedings 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

Implicit in the Undisputed Grant of State Regulatory Jurisdiction Under 18 U.S.C. § 1161 Is Authority to Enforce Such Jurisdiction Through Criminal Sanctions 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Brown v. District Court,
238 Mont. 248, 777 P.2d 877 (1989) 1, 2

Rice v. Rehner,
463 U.S. 713 (1983) 1-8

United States v. Mazurie,
419 U.S. 544 (1975) 4, 5

Younger v. Harris,
401 U.S. 39 (1971) 2, 3

STATUTES:

Montana Code Annotated (1989)

§ 16-6-301(1) 1, 6
§ 16-6-302 1

Public Law 280 7

United States Code

Tit. 18, § 1154 . . . . . 4, 5-7
Tit. 18, § 1156 4-6
Tit. 18, § 1161 1-8
Tit. 25, § 1321-1322 7
Tit. 28, § 1257(a) 2

TABLE OF AUTHORITIES

Page

United States Constitution

Amend. XI 2

MISCELLANEOUS

Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39 (1971) 7

Federal Indian Law (1958) 6

Respondents Joseph P. Mazurek, as Attorney General for the State of Montana, and Mark Harshman, as County Attorney for Blaine County, Montana, respectfully submit their brief in opposition to petition for writ of certiorari

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STATEMENT

I. State Court Proceedings

This controversy arose from a criminal action filed in February 1988 in the District Court for the Seventeenth Judicial District of the State of Montana against Caroline Ann Brown and Harley Leroy Brown. The criminal information alleged that the Browns, who operate a grocery store near Hayes, Montana, within the exterior boundaries of the Fort Belknap Indian Reservation, had possessed, offered for sale, and sold alcoholic beverages without appropriate state licensure under Mont. Code Ann. § 16-6-301(1) (1989). The penalty for the alleged violation is a fine of not less than $1,000 or more than $5,000, imprisonment in the state prison for not less than one year or more than five years, or both such fine and imprisonment. Mont. Code Ann. § 16-6-302 (1989).

The Browns pled not guilty and later moved to dismiss the information on jurisdictional grounds, arguing Montana lacked criminal jurisdiction over them because they were Indians. The state district court concluded that jurisdiction to maintain the state criminal proceeding against the Browns was granted by 18 U.S.C. § 1161. They then petitioned the Montana Supreme Court for interlocutory review of the district court's denial of their dismissal motion. The Supreme Court accepted supervisory control jurisdiction in December 1988 and affirmed the district court in July 1989. *Brown v. District Court*, 238 Mont. 248, 777 P.2d 877 (1989) (App. at 17). Relying on *Rice v. Rehner*, 463 U.S. 713 (1983), the court reasoned that 18 U.S.C. § 1161 authorized imposition of both

state civil and criminal laws regulating the possession and sale of liquor in Indian country against all individuals, irrespective of their tribal membership status. (App. at 26-27.) The Browns did not seek review of such decision by this Court under 28 U.S.C. § 1257(a), and the state district court proceedings against the Browns remain pending.

II. Federal Court Proceedings

The Petitioner initiated the action below against the State of Montana in December 1989, alleging in part that the latter had wrongfully sought to enforce state criminal laws with respect to liquor law violations against tribal members or other Indians for conduct within the Fort Belknap Indian Reservation. The Petitioner claimed the State's exercise of criminal jurisdiction interfered with tribal self-government interests.

The State moved for summary judgment on the grounds that jurisdiction over the State was barred by the Eleventh Amendment, that abstention principles developed under *Younger v. Harris*, 401 U.S. 39 (1971), and later decisions required dismissal of the action, and that the State possessed criminal jurisdiction over on-reservation violations of state liquor laws by Indians pursuant to 18 U.S.C. § 1161. The district court granted the State's motion on the Eleventh Amendment ground. (Pet. App. at 28 n.10.) The court, however, also expressed its conclusion that Montana lacked jurisdiction to prosecute Indians for violation of the state liquor laws when such violation occurred within Indian country, relying on Justice Blackmun's dissent in *Rice v. Rehner*, 463 U.S. 713, 735 (1983) for the proposition that federal authority to prosecute Indian country liquor-related offenses is vested exclusively within the United States. (Pet. App. at 39-40.) It accordingly granted the Petitioner leave to amend the complaint, and the tribe did amend, naming as defendants the Montana Attorney General and the county attorney for Blaine

County where the Fort Belknap Reservation is located and who is responsible for the Browns' prosecution. (App. at 7.) In response to those defendants' motion to vacate the judgment entered after the amended complaint was filed, the district court addressed, and rejected the *Younger*-based abstention defense and adhered to its previous determination with respect to the scope of state authority under § 1161. (App. at 3, 5.)

The Court of Appeals affirmed the District Court's refusal to abstain but, like the Montana Supreme Court, held that § 1161 authorized the exercise of state criminal jurisdiction over Indians with respect to violation of Montana liquor laws.[1] As to the second issue, the court reasoned that, while *Rice* was not concerned specifically with the issue of state criminal jurisdiction, it did make "several references to criminal prosecution in the area of liquor regulation," cited favorably a United States Department of the Interior treatise published shortly after § 1161's enactment, which assumed state criminal prosecution is available against any individual not possessing a valid liquor license, and disapproved a 1971 "Interior Department decision which concluded that states could not prosecute Indians for violations of state liquor laws." (Pet. App. at 16-17.) It found the District Court's construction of § 1161 unpersuasive because, contrary to *Rice*, it "would give the states no power at all[] but merely allow the federal government to enforce state law" and because, logically extended, it would deprive even tribes of the authority to enforce their liquor ordinances against Indians. (*Id.* at 21-22.)

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[1]The Respondents have filed a cross-petition for writ of certiorari directed to the Court of Appeals' disposition of the abstention issue.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly determined that *Rice v. Rehner*, 463 U.S. 713 (1983), governs resolution of the Petitioner's claim that Montana lacks jurisdiction to prosecute the Browns. *Rice* arose from a challenge to California's licensure requirement as to persons selling liquor for off-premises consumption--the same requirement at issue in the Browns' prosecution--and unequivocally established that States have the authority under 18 U.S.C. § 1161 to regulate all liquor transactions in Indian country, including those by Indians. Part and parcel in that regulatory authority is the power to impose sanctions for failure to comply with state law. Any other result would eviscerate *Rice* and its determination that § 1161, as an explicit delegation of authority to the States, did far more than simply make their law the "standard of measurement" for purposes of federal prosecution under 18 U.S.C. §§ 1154 and 1156. *Rice* is clearly dispositive, and there is thus no important question of federal law presented by the petition which requires this Court's attention.

ARGUMENT

Implicit in the Undisputed Grant of State Regulatory Jurisdiction Under 18 U.S.C. § 1161 Is Authority to Enforce Such Jurisdiction Through Criminal Sanctions.

The Court recognized in *United States v. Mazurie*, 419 U.S. 544, 547 (1975), that 18 U.S.C. § 1161 represents "local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." It specifically rejected the contention that Congress could not delegate such regulatory authority to tribes with respect to nonmembers, concluding that, irrespective of whether tribes had the inherent authority to so regulate, "[i]t is

necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils *this portion of its own authority* 'to regulate Commerce . . . with the Indian tribes.'" *Id.* at 557 (emphasis added). *Mazurie* thus established that § 1161 was intended to grant tribes plenary power to regulate liquor sale and use within their respective reservations--power they historically had not possessed.

Mazurie left unanswered the question of whether States were given, as the literal language of § 1161 suggests, concurrent authority to apply their liquor laws in Indian country to all persons, Indians and non-Indians alike. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court answered this question affirmatively. *Rice* arose from a declaratory judgment action filed by a member of the Pala Tribe alleging that she was not subject to California liquor regulations with respect to her business on the Pala Reservation. *Id.* at 715 n.2. The court of appeals held that the State lacked authority because, "if Congress wished to remove 'its veil of preemption,' it needed to do so by an express statement that the State had jurisdiction to impose its licensing requirement." *Id.* at 717. This Court disagreed since, "[b]y enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the [pre-§ 1161] federal prohibition" against introducing liquor into Indian country. *Id.* at 733. It further concluded that "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Id.* at 734. *Rice* accordingly established that § 1161 was intended not only to make compliance with state law one component of avoiding federal prosecution under 18 U.S.C. §§ 1154 and 1156 but also to grant States independent authority to regulate directly the reservation possession and sale of alcohol by non-Indians, nonmember Indians, and members like the plaintiff in that case.

The issue thus becomes whether, in light of Montana's indisputable authority to regulate all reservation liquor transactions, it nonetheless is foreclosed from enforcing that regulatory authority through applicable civil or criminal sanctions. To credit that proposition would mean that only the federal government, acting as prosecutor under 18 U.S.C. §§ 1154 and 1156, could remedy noncompliance with state or tribal law and that such law does nothing more than provide the "standard of measurement" for determining whether federal statutes governing liquor transactions in Indian country have been violated. The Court in *Rice*, however, concluded that state law was not simply a "standard of measurement" incorporated into federal law for purposes of liquor licensing and that a State's liquor law would apply of its own force to *all* persons within Indian country. 463 U.S. at 726. Because the power to regulate necessarily includes the power to sanction for noncompliance with the regulation, the fundamental analytical predicate underlying *Rice* counsels directly against the Petitioner's position.

Moreover, as the Court of Appeals observed, *Rice* specifically suggested that States may prosecute Indians and non-Indians for liquor law violations. First, this Court held that, for purposes of liquor regulation by States, Indians and non-Indians are identically situated. Implicit in this holding is the notion that, to the extent non-Indians may be subject to state sanctions for liquor-law noncompliance, so may Indians. Again, tribal members and other Indians are not granted preferential treatment or "super citizen" status under § 1161. The Petitioner cannot, and apparently does not, argue non-Indians are exempt from state criminal prosecution for reservation-based violations of Mont. Code Ann. § 16-6-301(1), and a contrary claim with respect to Indians, if accepted, would just as obviously destroy the regulatory symmetry envisioned by § 1161. The Court thus cited favorably the Department of the Interior's treatise, *Federal Indian Law* 382-83 (1958), for the principle that § 1161 authorized "state prosecutions for failure to have a state

[liquor] license" against Indians. 463 U.S. at 732; *accord id.* at 729-30.

Second, the Court disapproved a later Department of the Interior opinion, *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39 (1971). 463 U.S. at 730 n.13. In part the disapproved opinion stated:

> We do not believe Congress, in enacting [§ 1161], intended to make state liquor laws applicable to the tribe or tribal members on a reservation when a tribe wished to terminate Federal prohibition. If Congress had intended to impose state law with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. sec. 1161, which it did not do. Rather, we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.
>
> If, for example, the tribe has terminated Federal prohibition, and a tribal member commits an act or engages in a transaction in intoxicating beverages which is not in conformance with state law, the member would be subject to prosecution in the Federal courts for violation of the applicable Federal Indian liquor law. *See* 18 U.S.C. sec. 1154 (1964). However, the tribal member is not subject to prosecution in state court since Montana has not assumed the requisite jurisdiction over the Rocky Boy's Reservation under either Public Law 280 . . . or under the Civil Rights Act of 1968 [25 U.S.C. § 1321-1322]. In such a

> situation, state criminal law does not apply to an Indian in "Indian country." . . .
>
> However, if a non-Indian does not conform with the liquor laws of Montana while on an Indian reservation, the Federal courts and the state courts may both have jurisdiction over him for violations of separate state and Federal law, assuming a question of double jeopardy is not presented. It is well settled that non-Indians are subject to state law when committing crimes within "Indian country."

78 I.D. at 40-41 (citations & footnote omitted). *Rice* unequivocally rejected the reasoning of this opinion which, at its core, was premised on granting tribes and their members a unique dispensation from state liquor-law regulation and the consequences of noncompliance with that regulation.

The Petitioner nevertheless argues that the ordinary lack of state criminal jurisdiction over Indians with respect to Indian country offenses dictates a different result. Whatever the preemptive impact of federal criminal statutes in other contexts, the fact remains that § 1161, as construed in *Rice*, contains a special delegation of authority to States and tribes. This delegation negatives any legitimate claim that States are preempted from applying criminal, but not civil, sanctions to remedy noncompliance with their liquor laws. It also negatives any legitimate claim that the petition presents an important and undecided question of federal law.

CONCLUSION

The Respondents respectfully request that the petition for writ of certiorari be denied.

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June 1995

APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

Memorandum and Order Denying Defendant's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (October 19th, 1993) 1

Amended Complaint, *The Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Donald Ranstrom, Blaine County Attorney, State of Montana, and Marc Racicot, Attorney General, State of Montana*, No. CV-89-215-GF (April 30, 1992) (attachments not included) 7

Opinion of the Montana Supreme Court, *Caroline Ann Brown and Harley Leroy Brown v. District Court for the State of Montana, in and for the County of Blaine, and The Honorable Leonard Langen*, No. 88-487 (July 19, 1989) 17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, Plaintiff, vs. JOSEPH P. MAZUREK, as Attorney General for the State of Montana, and DONALD A. RANSTROM, as County Attorney for Blaine County, Montana, Defendant.	NO. CV-89-215-GF MEMORANDUM AND ORDER (Filed Oct. 19, 1993)

The issue presented for resolution in this action is whether or not the State of Montana possesses jurisdiction to criminally prosecute an Indian person for a violation of the "liquor" laws of the State of Montana, when that violation occurs within the boundaries of the Fort Belknap Indian Reservation. Pursuant to Judgment entered on May 20, 1992, this court answered that inquiry in the negative and entered summary judgment, pursuant to Fed.R.Civ.P. 56, in favor of the plaintiff, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, the governing body of the Reservation. The matter is presently before the court upon motion of the

defendants requesting relief from the Judgment pursuant to Fed.R.Civ.P. 60(b).[1]

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[1] The court deems it imperative to recount the procedural history attendant the motion now before the court given the significant period of time which has elapsed since submission of the motion to this court and the present ruling. Subsequent to the entry of Judgment the defendants, on June 3, 1992, presented the court with a motion styled as a "Motion to Withdraw" the Judgment. The defendants did not state whether the motion was presented pursuant to Fed.R.Civ.P. 59(a) or was designed to seek the relief available under Fed.R.Civ.P. 60(a) or (b). More importantly, it was not clear, from the text of the motion, whether or not the defendants were seeking a substantive change in the Judgment since the basis of the motion lay in the assertion that the defendants were not served with a copy of the plaintiff's amended complaint.

Subsequent to the presentation of the referenced motion, and prior to any response being presented by the plaintiff, the defendants, on June 17, 1992, filed a notice of appeal relative to the final Judgment entered on May 20, 1992. The appeal was docketed with the United States Court of Appeals for the Ninth Circuit on June 23, 1992. The defendants, however, ultimately moved for voluntary dismissal of the appeal pursuant to Fed.R.App.P. 42(b); a motion which was granted on August 27, 1992.

Subsequent to the voluntary dismissal of the appeal, the defendants did not file a formal pleading with this court advising the court of their intention to seek disposition of the referenced motion to withdraw. Based upon an informal inquiry by counsel for the defendants on June 2, 1993, the court convened a status conference. Pursuant to the discussion elicited at the conference, the court afforded the defendants a period of time within which to supplement their motion. Upon review of the papers submitted by the defendants in support of their motion, the court finds that the motion is predicated upon a purported error of law and, hence, the motion is properly characterized as one

Having considered the defendants' request that the court reconsider the rationale it previously expressed rejecting the notion that the State of Montana could assert criminal jurisdiction over an Indian person for a violation of the liquor laws of the State of Montana that occur within the boundaries of the Fort Belknap Indian Reservation, the court deems it appropriate to AFFIRM the rationale expressed in its memorandum and order of April 22, 1992. An additional point raised by the defendants, and not previously addressed, bears comment.

As an alternate basis in support of their request for relief from the Judgment, the defendants invoke the *Younger* abstention doctrine and implore the court to refrain from exercising jurisdiction over this controversy. Generally stated, the *Younger* abstention doctrine, which stems from *Younger v. Harris,* 401 U.S. 37 (1971), recognizes that a federal court should not enjoin a pending state criminal prosecution. As the defendants accurately note, the rationale of *Younger* is equally compelling in a suit for declaratory relief since in both situations federal court intervention in state criminal proceedings is undesirable, when the federal claims could be presented in ongoing state judicial proceedings that concern important state interests. *Samuels v. Mackell,* 401 U.S. 66 (1971).

This action, of course, has its genesis in the criminal prosecution, by the State of Montana, of an Indian person for a violation of that entity's "liquor" laws that occurred upon the Fort Belknap Indian Reservation. Although the

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cognizable under Fed.R.Civ.P. 60(b). *See, Liberty Mutual Ins. Co. v. EEOC,* 691 F.2d 438 (9th Cir. 1982) (holding that errors of law are cognizable under Rule 60(b)).

present action is prosecuted by the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, the declaratory relief sought, the defendants submit, constitutes unwarranted federal interference in an ongoing state criminal proceeding. In the opinion of the defendants, the rationale of *Younger* and its progeny dictate that this court refrain from exercising jurisdiction. The court, however, finds the defendants' reliance upon *Younger* to be misplaced for two reasons.

First, *Younger* does not bar individuals who are nonparties in the related state proceeding, who possess the requisite standing in federal court, from seeking federal relief. *See, Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927-29 (1975). The Community instituted this declaratory judgment action challenging the State of Montana's authority to prosecute Indian persons for criminal violations of state liquor laws that occur within Indian country. While the state prosecution of an individual Indian person for violation of the state liquor laws obviously prompted the Community to pursue federal relief, the Community must be considered as standing alone in determining whether the dictate of *Younger* compels this court to refrain from exercising jurisdiction over the Community's claim for declaratory relief. *See, Doran*, 422 U.S. at 928-929. Because the Community, in the opinion of this court, possesses standing to prosecute this action for declaratory relief under 28 U.S.C. § 1362, the state is precluded from relying upon the *Younger* abstention doctrine to preclude the Community from obtaining the declaratory relief requested.

Second, and more importantly, there does not exist a legitimate basis for invoking the *Younger* doctrine under

the circumstances of this case. The holdings of the Supreme Court do not suggest that the existence of any proceeding between a state and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies. *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979). Rather, it is when federal intervention poses a "threat to our federal system . . . by displacement of state courts by those of the National Government" that abstention is warranted. *Moore*, 442 U.S. at 423. The "threat" has been recognized as sufficient, not only where criminal proceedings or quasi-criminal proceedings are pending against the federal plaintiff, *see, Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), but where other "vital" state concerns are implicated. *Moore*, 442 U.S. at 423, *citing, Juidice v. Vail*, 430 U.S. 327 (1977) (enforcement of contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (safeguarding fiscal integrity of state public assistance programs).

The imperative consideration underlying the abstention doctrine is, of course, "the notion of 'comity', that is, a proper respect for state functions." *Huffman*, 420 U.S. at 601, *quoting, Younger*, 401 U.S. at 44. Consequently, the doctrine is narrow in scope and unless vital state interests are at stake, federal courts have an "unflagging" obligation to exercise their jurisdiction. *Miofsky v. Sup. Ct.*, 703 F.2d 332, 338 (9th Cir. 1983). The notion of "comity", however, is simply not compelling in the instant case. The reach of criminal jurisdiction over Indian persons for crimes committed in Indian country is a matter of federal interest, not a vital state interest. Contrary to the assertion of the defendants, this court must exercise jurisdiction over the Community's claim.

Therefore, for the reasons set forth herein, IT IS HEREBY ORDERED that the defendants' motion for relief from the Judgment is DENIED.

DATED this 19 day of October, 1993.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE FORT BELKNAP INDIAN COMMUNITY of the FORT BELKNAP INDIAN RESERVATION. Plaintiff, vs. DONALD RANSTROM, Blaine County Attorney, State of Montana, and MARC RACICOT, Attorney General, State of Montana. Defendant.	Case No. CV-89-215-GF AMENDED COMPLAINT

I.

Plaintiff, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation is a recognized Indian community as established by the Gros Ventre and Assiniboine Tribes under the Indian Reorganization Act of 1934, and is currently a sovereign body with headquarters located at Fort Belknap Agency, County of Blaine, State of

Montana, and their mailing address is P.O. Box 249, Harlem, Montana 59526.

II.

Defendant, Donald Ranstrom, is the duly elected County Attorney for Blaine County, Montana, is responsible for the initiation of prosecutions within his jurisdiction, under state law, and maintains his office at the Blaine County Courthouse, Chinook, Montana 59523.

III.

Defendant, Marc Racicot, is the duly elected Attorney General for the State of Montana, is responsible for prosecutions of actions within the State of Montana when County Attorneys have a perceived or real conflict, otherwise provides prosecution assistance to local county attorneys, and maintains his office at the Justice Building, 215 No. Sanders, Helena, Montana 59620-1401.

III.

This is an action for declaratory judgment pursuant to 28 U.S.C. 2201 for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears, and further, for injunctive relief to prevent further wrongful acts on the part of defendants.

IV.

This Court has jurisdiction of this action based on 28 U.S.C. 1331(a) and 28 U.S.C. 1362 and 28 U.S.C. 1343 and 18 U.S.C. 1161, as federal questions control this case and arise under said provisions.

V.

That on or about January 6, 1988, a Complaint was filed in the Fort Belknap Indian Community Tribal Court citing Chin Martin, Harley Brown, and Caroline Brown for violations of Sect. 1.81. Title V of the Fort Belknap Tribal Code. That pursuant such complaint, warrants to arrest were issued for Caroline and Harley Brown, together with search warrants authorizing the search of their grocery store located near Hays, Montana, within the boundaries of the Fort Belknap Indian Reservation. That pursuant such action, law enforcement officers went to the Brown's grocery store near Hays, Montana, and searched said premises, returning an execution of search warrant to the Tribal Court.

VI.

That in returning said property to the Tribal Court, Bureau of Indian Affairs Criminal Investigator, Robert J. Ironmaker, Sr., who was in charge of the search, allowed the property seized in the search to be released to deputies of Blaine County Sheriff Glenn Huestis for storage in a garage, because the Bureau of Indian Affairs lacked a suitable place for storage.

VII.

That sometime later the State of Montana, through the office of the Blaine County Attorney, who may or may not have consulted with the Attorney General's office, caused certain felony charges to be filed in State District Court in Blaine County, Montana, in a cause entitled State of Montana, plaintiff, vs. Harley Leroy Brown and Caroline Ann Brown, defendants, Cause No 1199.

VIII.

That on or about January 12, 1988, after the initial appearance of Harley and Caroline Brown in the Tribal Court matters, said Criminal Investigator Robert Ironmaker requested the Tribal court charges involved therein to be dismissed, as he related that charges would be pursued in state or federal court. That pursuant such request, the Tribal Prosecutor, John Contway, filed a Motion in Tribal Court to dismiss the actions against Caroline and Harley Brown. The tribal court issued an Order dismissing the charges against Caroline and Harley Brown without prejudice.

IX.

That at no time subsequent thereto until a Motion to return property was filed by counsel for Caroline and Harley Brown, was the Court approached to authorize transfer of the property seized in the search warrant to the State of Montana or was there otherwise an order issued pursuant such seizure. In October, 1989, over 18 months later, the Browns moved the Tribal Court that the

property seized under the Tribal Court action be returned, as nothing further was pursued in Tribal Court.

X.

That after response to the Motion was filed by the Tribal Prosecutor the Tribal Court issued an Order directing the property be returned to the Browns. (See attachment "A").

XI.

That apparently in response thereto, with the expressed desire to avoid the Order of the Tribal Judge, Sheriff Glenn Huestis contacted the Blaine County Attorney, Donald Ranstrom, and he, in turn, caused a Petition for a Protective Order to be filed in the pending criminal action against Harley and Caroline Brown, asking for apparent permission to disobey the Tribal Court Order.

XII.

Judge Leonard Langen, in an Order issued on or about November 15, 1989, granted the request of the Blaine County Attorney, and in pertinent part, ordered " . . . that all the law enforcement officers and officers of this Court shall be excused from complying with any Tribal Court order to the contrary", referring to the ordered return of the evidence seized on or about January 6, 1988, from the Browns' store. (See attachment "B").

XIII.

That Harley Brown and Caroline Brown are each members of federally recognized Indian tribes, doing business on land that is held in trust status within the boundaries of the Fort Belknap Indian Reservation.

XIV.

That the Fort Belknap Community Council, through the Fort Belknap Indian Community Tribal Court, in receiving the Complaints and issuing arrest warrants and search warrants on or about January 6, 1988, was exercising its authority over Indians within the boundaries of the Fort Belknap Indian Reservation, as an approved Tribal government, under the Indian Reorganization Act of 1934.

XV.

That said powers are exercised pursuant an established Tribal Code, specifically Sect. 1.81 of Title V of the Fort Belknap Tribal Code. It was asserted to the Court in the original Complaints of January 6, 1988, that the Browns were in violation of existing tribal law, Resolution Numbers 3-74 and 3-77. That in exercising such authority, the Fort Belknap Community Tribal Court was invoking the jurisdiction specifically granted to that Court under the Tribal Code, duly adopted by the Fort Belknap Community Council.

XVI.

That because in excess of 18 months had passed since any action had taken place in the Tribal Court proceeding, and because said action had been formally dismissed, it was a reasonable exercise of Tribal Authority to order that evidence seized pursuant its search warrant be returned to the owners thereof, Caroline and Harley Brown.

XVII.

That said action was taken pursuant an appropriate Motion, with an adequate opportunity provided to the Tribal Prosecutor to respond and approve or disapprove of said Motion.

XVIII.

That the defendants, either themselves or through various agents, have sought to specifically frustrate this exercise of tribal sovereignty, by seeking, without a hearing, to ignore the lawful orders of the Tribal Court. The defendants filed nothing in Tribal Court to seek "protection" or other action.

XIX.

That pursuant the search warrant of January 6, 1988, the deputies of Blaine County Sheriff, Glenn Huestis, were acting as agents of the Tribal Court, as storage thereof was done strictly for convenience purposes, and there was no order or application made for an order

transferring said property to the formal jurisdiction of the State of Montana.

XX.

That in as much as property being held was taken and held pursuant the Tribal court search warrant, the Tribal Court maintained authority over said property until such time it ordered otherwise.

XXI.

That the defendants, either directly, or in concert with others, in choosing to deny the lawful Orders of the Tribal Court, having frustrated the ability of the Fort Belknap Community Council, Fort Belknap Community Tribal Court, and their various agencies and subentities, to exercise reasonable forms of self government as guaranteed by the Indian Reorganization Act of 1934, and existing tribal sovereignty.

XXII.

That secondly, the defendants have wrongfully sought to enforce the criminal laws of the State of Montana against Tribal members acting wholly within the boundaries of the Fort Belknap Indian Reservation, in spite of Tribal laws in place which provide state recognized means of enforcement of liquor regulation. Such action has also frustrated the ability of the Fort Belknap Indian Community to govern itself, has misrepresented the Community's willingness to exercise such authority,

and has precipitated a growing rift in cooperation between law enforcement agencies at the local level.

WHEREFORE, IT IS RESPECTFULLY REQUESTED that this Court enter an Order granting the plaintiff the following relief:

1. That this Court enter a declaratory judgment finding that one or both of the defendants or those under there [sic] charge have illegally infringed upon the right of the Fort Belknap Indian Community to govern itself and its people by wrongfully seeking to countermand a valid court order of the Fort Belknap Indian Community Tribal Court.

2. That this Court enter a declaratory judgment finding that one or both of the defendants or those under there [sic] charge have illegally infringed upon the right of the Fort Belknap Indian Community to govern itself by attempting to enforce State of Montana criminal laws within the boundaries of the Fort Belknap Indian Reservation against Indians enrolled in federally recognized Tribes, frustrating Tribal attempts to enforce its own criminal laws, which are similar to the State of Montana's.

3. That this Court permanently enjoin the defendants and those under their charge from interfering with the lawful orders of the Fort Belknap Indian Community Tribal Court concerning certain evidence seized from Harley and Caroline Brown, and further, permanently enjoin the defendants and those under their charge from all attempts at enforcing State of Montana criminal laws in State Courts against members of federally recognized Indian tribes within the boundaries of the Fort Belknap Indian Reservation.

4. For such further relief this Court deems necessary and appropriate, as allowed by law

RESPECTFULLY SUBMITTED this 30th day of April, 1992.

/s/ James Vogel
James Vogel
Attorney for the Fort Belknap
Indian Community

No. 88-487

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1989

CAROLINE ANN BROWN AND
HARLEY LEROY BROWN,

Petitioners,

-vs-

DISTRICT COURT OF THE SEVENTEENTH
JUDICIAL DISTRICT FOR THE STATE
OF MONTANA, IN AND FOR THE
COUNTY OF BLAINE, and THE
HONORABLE LEONARD LANGEN,
a Judge thereof,

Respondents.

ORIGINAL PROCEEDING:

COUNSEL OF RECORD:

For Petitioner:

Frisbee, Moore, Stufft & Olson; Jayne Mitchell, Cut Bank, Montana

For Respondent:

Hon. Marc Racicot, Attorney General, Helena, Montana
Clay Smith, Solicitor, Attorney General's Office
Donald Ranstrom, County Attorney, Chinook, Montana

Submitted on Briefs: Dec. 14, 1988
Decided: July 19, 1989

Filed: July 19, 1989

/s/ Illegible
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The United States Supreme Court in Rice, Director, Department of Alcoholic Beverage Control of California v. Rehner (hereafter *Rice v. Rehner*) (1983), 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961, decided that Congress, by enacting 18 U.S.C. § 1161, gave states the power to regulate within their borders the possession and sale of liquor by Indian persons in Indian country through the licensing provisions of the states. Our case here answers the further problem: whether such liquor regulation by the states includes the power to enforce state criminal statutes against Indian persons for violations of state law relating to the possession or the sale of liquor within Indian country. We hold here that under *Rice v. Rehner*, and the applicable federal statute, Montana can, and does, have the power to punish by criminal proceedings in its state courts violations of state liquor laws occurring within its borders by Indian persons in Indian country. Because of our holding, we deny the petition for a writ of supervisory control from this Court, and dismiss these proceedings.

In *Rice v. Rehner*, the pivotal case here, Rehner was a federally licensed Indian trader who operated a general

store on the Pala Reservation in San Diego, California. The Pala Tribe had adopted a tribal ordinance permitting the sale of liquor on the reservation, providing that the sales conformed to state law. Rehner sought from the state an exemption from its law requiring a state license for retail sale of liquor for off-premises consumption. When she was refused an exemption, Rehner filed suit seeking a declaratory judgment that she was not required to obtain a license from the state and an order directing that liquor wholesalers could sell to her without her state license. The federal district court granted the state's motion to dismiss, ruling that Rehner was required to have a state license under 18 U.S.C. § 1161. The Court of Appeals reversed the district court, holding that § 1161 did not confer jurisdiction on the states to require liquor licenses. (9th Cir. 1982), 678 F.2d 1340. On writ of certiorari, the United States Supreme Court, as above noted, reversed the Court of Appeals, holding that California may properly require Rehner to obtain a state license in order to sell liquor for off-premises consumption.

As noted by the dissent in *Rice v. Rehner,* the United States Supreme Court rested its conclusion on three propositions. 463 U.S. at 738 (Blackmun, J., dissenting). First, the Supreme Court asserted that "tradition simply has not recognized sovereign immunity or inherent authority in favor of liquor regulation by Indians." Second, the Supreme Court found a "historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country." Third, the Supreme Court concluded that Congress "authorized . . . state regulation over Indian liquor transactions" by enacting 18 U.S.C. § 1161.

The principal argument of the petitioners (hereafter Brown or Browns) is that *Rice v. Rehner* held only that the states could require Indians transacting liquor business on the reservation to purchase a state liquor license. They argue that *Rice v. Rehner* did not, however, and could not, confer on the state criminal jurisdiction over liquor offenses committed by Indians on the reservation, contending that criminal jurisdiction over Indians can only be conferred upon the states by Congress with the express consent of the tribe. They argue that Montana has not been given such a grant of criminal jurisdiction.

The facts in this case parallel somewhat the facts in *Rice v. Rehner.* This action arises from an information filed in Blaine County District Court, charging Harley LeRoy Brown and Caroline Ann Brown with the felony offense of sale and possession of beer and wine without a license in violation of Montana's statute, § 16-6-301(1), MCA. Caroline Ann Brown is an enrolled member of the Fort Belknap Tribal Community of the Assiniboine and Gros Ventre Tribes. Harley LeRoy Brown is an Indian person residing on the Fort Belknap Reservation and is the husband of Caroline Anne Brown and the head of an Indian family. The Browns operate a small grocery store at Hays, Montana, selling groceries, as well as beer and wine. At the time of the alleged offense, they claim they had a valid tribal and federal license authorizing them to sell beer and wine. The District Court, however, noted that the Browns had not obtained from the tribe such a liquor license.

On January 6, 1988, the Blaine County Attorney caused a state search warrant to be issued from the Blaine County Justice Court. Law enforcement officials

attempted to execute the Blaine County search warrant on the reservation; but were told by the chief tribal judge of the Fort Belknap Tribal Court that the search warrant was invalid because the state had no jurisdiction on the reservation. Apparently, the state officers then caused an action to be filed in Tribal Court charging the Browns with criminal violations of tribal ordinances relating to the sale and display of liquor on the reservation. Under the charges filed in the Tribal Court, a search warrant was issued from that Court under which evidence was seized from the grocery store at Hays, Montana; and transported to Blaine County District Court. The evidence was not taken to the Tribal Court and it is contended that the tribal search warrant was not served upon Caroline Ann Brown, from whose possession the evidence was seized. Following the seizure and transport of the evidence, the Tribal Court action was dismissed. State court charges were filed against the Browns on February 4, 1988, after the Tribal Court action was dismissed.

On April 6, 1988, Browns moved to dismiss the charges against them on grounds that the Montana State District Court did not have criminal jurisdiction over Indians who allegedly committed crimes within the exterior boundaries of the reservation. The defendants further moved to quash the search warrant and suppress the evidence seized under the Tribal Court search warrant, which evidence had been transferred to the state court.

On August 6, 1988, the District Court denied both the motion to dismiss and the motion to quash. In denying the motion to dismiss, the District Court relied on *Rice v. Rehner* particularly. Thereupon, the petitioners filed their application for a writ of supervisory control or other

appropriate writ from this Court to review the issue of jurisdiction, and the issue of whether the evidence should be suppressed.

Under Title 18 U.S.C. §§ 1154, 1156, 3113, and 3488, introduction of liquor, possession thereof, dispensing thereof or transporting the same is forbidden in Indian country. As noted in *Rice v. Rehner*, 463 U.S. 722, Congress imposed complete prohibition of liquor on Indian lands in Indian country in 1832 and "these prohibitions are still in effect subject to suspension, conditioned on compliance with state law and tribal ordinance." The United States Supreme Court derived that statement from the provisions of Title 18 U.S.C. § 1161, which follow:

"The provisions of 1154, 1156, 3113, 3488 and 3618 of this title shall not apply within any area that is not Indian country nor to any act or transaction within any area of Indian country provided such act *or transaction is in conformity both with the laws of the state in which such act or transaction occurs* and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . " (Emphasis added.)

Plainly, under the language of § 1161, two things are necessary to remove the federal prohibition against liquor in Indian country: (1) conformity with the laws of the state in which the transaction occurs; and (2) an ordinance duly adopted by the tribe having jurisdiction over the area of Indian country. In this case, the Fort Belknap Indian Community adopted its Tribal Ordinance No. 3-74 in 1974, which regulates liquor transactions on the reservation under the jurisdiction of the Fort Belknap Indian

community "provided that such introduction, sale or possession is in conformity with the laws of the state of Montana."

The principal argument of Brown in this case is that *Rice v. Rehner* was a civil case, which only held that Indians transacting a liquor business on the reservation must purchase a state liquor license; and that it did not give state courts criminal jurisdiction over Indians who commit liquor offenses on the reservation. Brown contends that criminal jurisdiction over Indians can only be conferred upon the states by Congress by the express consent of the tribe. 18 U.S.C. § 1162. They contend that Montana has not been given such a grant of criminal jurisdiction.

Such an interpretation would be a narrow construction of 18 U.S.C. § 1161 and would overlook the specific reference in *Rice v. Rehner* that Congress has also historically permitted concurrent state regulation through the "imposition of criminal penalties on those who supply Indians with liquor, or who introduce liquor into Indian country." 463 U.S. at 726, 103 S.Ct. at 3299. The interpretation ignores also the obvious determination in *Rice v. Rehner* that the state was entitled to effective regulation of liquor, the Supreme Court saying:

"The historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests involved. See *Confederated Tribes*, supra, 447 U.S. at 156, 65 L.Ed.2d 10, 100 S.Ct. 2069. Rehner's distribution of liquor has a significant impact beyond the

limits of the Pala Reservation. The state has an unquestionable interest in liquor traffic that occurs within its borders, and this interest is independent of the authority conferred on the states by the Twenty-first Amendment. *Crowley v. Christiansen*, 137 U.S. 86, 91 (1890). Liquor sold by Rehner to other Pala tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the state does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the state has no control. This particular 'spillover' effect is qualitatively different from any 'spillover' effects of income taxes or taxes on cigarettes. 'A state's regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state intervention.' *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 234, 65 L.Ed.2d 611, 103 S.Ct. 2378 (1983)."

Rice v. Rehner, 463 U.S. at 724.

In this case, the district judge particularly noted the "spillover" effect, remarking that the state's regulatory interest was substantial because the Brown grocery was located on Montana State Highway No. 66, a state-maintained, two-lane paved highway, carrying non-Indian traffic from Billings, Montana, to the south; to Harlem, Montana, to the north. Moreover, *Rice v. Rehner* recognized that "it cannot be doubted that the state's police power over liquor transactions within its borders is broad enough to protect the same Congressional decision in favor of the state" [by allowing removal of the prohibition against liquor on reservations from transactions that conform both with the laws of the state and with a tribal ordinance]. 463 U.S. at 731.

The second principal argument made by Brown is that the Fort Belknap community has preempted the field by asserting exclusive jurisdiction over liquor offenses on the reservation. In support, they point to the criminal prosecution ordinances adopted by the tribe which provide procedures in the tribal courts for crimes committed on the reservation. They also point to Resolution No. 71-88, adopted by the tribal community on April 6, 1988, after the institution of the criminal action in this case. Resolution No. 71-88 declared in effect that its previously adopted ordinance allowing the use and sale of alcoholic beverages on the reservation did not cede or authorize jurisdiction within the reservation to the state of Montana.

For these contentions, the Browns rely on *State of Wisconsin v. Big John* (Wis. Ct. App. 1987), 409 N.W.2d 455; and upon the federal decisions in *U.S. v. Cowboy* (10th Cir. 1982), 694 F.2d 1228; *U.S. v. Johnson* (9th Cir. 1980), 637 F.2d 1224; and *U.S. v. Allen* (8th Cir. 1978), 574 F.2d 435.

State v. Big John, supra, has no application in this cause because it involved the state's attempt to regulate the use of boats in Wisconsin, an activity well within the traditional area of Indian tribal sovereignty. *Rice v. Rehner* specifically pointed out that the regulation of liquor on reservations was not within the inherent or historical tribal sovereignty. The federal cases likewise do not support Brown in this case. *U.S. v. Allen*, supra, involved an assault by an Indian against other Indians on a reservation and has no connection with the interpretation of Indian liquor laws except that the parties were drinking when the assault occurred. *U.S. v. Johnson*, supra, held

that offenses by an Indian against an Indian are subject to the jurisdiction of the Tribal Courts if not covered by the Major Crimes Act, in a case construing the federal Juvenile Delinquency Act. *U.S. v. Cowboy*, supra, held that the tribal courts had concurrent jurisdiction with the federal courts over Indians who offend 18 U.S.C. § 1154 (dispensing liquor). No state statutes were involved and the court there did not pass upon the application of state criminal laws under 18 U.S.C. § 1161.

The state district court in this case rejected the preemption argument pointing to the language in *Rice v. Rehner*, which said:

" . . . Our examination of § 1161 leads us to conclude that Congress authorized, rather than preempted state regulation over Indian liquor transactions."

463 U.S. at 726.

Again, the District Court noted from *Rice v. Rehner*:

"It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinances and state law. It is also clear that Congress contemplated that its absolute, but not exclusive power, to regulate Indian liquor transactions would be delegated to the tribes themselves and to the states, which historically shared concurrent jurisdiction with the federal government in the same area . . . "

463 U.S. at 728.

We agree with the District Court that preemption has not occurred here. In sum, we hold that when Congress

decided to allow the end of prohibition of liquor on reservations in certain cases, it did so under the conditions that state law and tribal ordinances would regulate liquor transactions in Indian country. If we were to interpret 18 U.S.C. § 1161 as permitting only state licensing of liquor transactions on Indian reservations, but not the power to enforce the same, the state would be powerless to effectuate the intent of Congress that such liquor transactions on reservations be "in conformity with state law."

Rice v. Rehner, supra, was decided by a divided court, but its majority holding clearly implies that state criminal laws relating to liquor transgressions apply to offenses committed by Indians in Indian country. We so hold.

With respect to the second portion of Browns' petition for writ in this cause asking us to direct the suppression of the evidence seized under the tribal search warrant, we find this issue to be premature because Browns have a clear remedy by appeal. The order denying suppression of the evidence is interlocutory and in such case a writ of supervisory control from this Court is not obtainable.

The application for writ of supervisory control is denied and these proceedings dismissed.

MR. CHIEF JUSTICE TURNAGE and MR. JUSTICES HARRISON, GULBRANDSON, McDONOUGH, HUNT and WEBER concur.